Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

OCTOBER TERM, 2003

VENERO MANGANO,

Petitioner,

–v.–

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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34 pp

QUESTION PRESENTED

Should the Court of Appeals for the Second Circuit have issued a Certificate of Appealability to review whether petitioner's substantial rights were affected when his sentence was enhanced by the District Court for facts not proved beyond a reasonable doubt where those facts acted to nearly double the penalty from that prescribed from the jury's verdict?

THE PARTIES

Other parties whom may be affected by this decision are one: Mr. Benedetto Aloi.

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The memorandum and order of the United States District Court for the Eastern District of New York appears in Appendix A.

The decision of the United States Court of Appeals for the Second Circuit appears in Appendix B.

JURISDICTION

This matter originated via motion in the United States District Court for the Eastern District of New York through Title 28 U.S.C. §2255, decided August 30, 1999.

The United States Court of Appeals for the Second Circuit decided this case on June 26, 2003.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

21 U.S.C. § 1951. Interference with commerce by threats or violence

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

(b) As used in this section - -

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to this person, or property, or property in his custody or possession, or the person or property of a relative or member of his family or anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and

all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repael, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.

This case also involves the application of United States Sentencing Guideline §§2B3.2 and 2B3.2(b)(2).

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VENERO MANGANO,

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UNITED STATES OF AMERICA,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Venero Mangano, pro se, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit denying a certificate of appealability.

STATEMENT OF THE CASE

Mr. Venero Mangano, hereinafter "Mr. Mangano" or "Petitioner", was convicted after a 7-month "mega-trial" of eight defendants. The jury at this trial, conducted before District Court Judge Dearie, in fact rejected the bulk of the government's allegations at trial: out of a total of 69 separate counts, the jury convicted Mr. Mangano of only two counts, a

Hobbs Act substantive and conspiracy count, and acquitted him of the other 67 (including a racketeering count with 109 predicate act allegations). The remaining defendants in this case, with the exception of two others, were acquitted on every count.

Some ten months after the verdict, and before the government moved for a 40-year upward departure as to Mr. Mangano, an accusation, which apparently emanated from a cooperating witness, was leveled that Mr. Mangano and another defendant, Mr. Benedetto Aloi, had participated in a scheme which included the authorization of the murder of potential witnesses against them. After substantial discussion about whether uncharged crimes could and should be used to enhance sentences, a somewhat abbreviated hearing was held before Judge Dearie.

Following this hearing, Mr. Mangano was sentenced to a term of 188 months in prison. Without these upward departures, the base offense level was 18; above this, points were added to the base offense level for "leadership role" and "monetary loss". The result of this was a level 29, which would have yielded a sentence of 87-108 months (with a criminal history category of I) without an upward departure.[1]

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[1] The Guideline calculation is as follows: Pursuant to Guideline §2B3.2, the extortion convictions carried a base offense level of 18. Mr. Mangano's criminal history category is I, which carries a sentencing range, without any adjustments, of 27-33 months.

The Court then departed upward, adjusting the base offense level by seven (7) points (approximately two and half to three years) pursuant to USSG §2B3.2(b)(2), upon a finding that there had been an "amount demanded" of more than $5 million. This adjustment raised the offense level to 25, with a range of 57-71 months (approximately five (5) years).

The government sought, and the court imposed, this upward departure despite the fact that there was not a hint of violence alleged against Mr. Mangano in either count of this indictment.[2]

Only after movant's conviction and sentence were affirmed, did Mr. Mangano learn that (a) Judge Dearie had been accused of being "on the take" by an "organized crime" "turncoat" before sentence was imposed in this case, and this same "turncoat" had also made allegations used against Mr. Mangano to increase his sentence; (b) movant's sentencing counsel did not tell his client about the allegation prior to sentencing, even though they knew about it; and (c) the government had provided only partial information about that turncoat's allegations about Judge Dearie, implicating *Brady* obligations. Petitioner brought action under 28 U.S.C. §2255

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[2] The specific allegations at trial concerned the defendant's supposed control over windows manufacturing and installation companies, as well as over various labor unions. The allegations were that the defendants exerted control over which manufacturing companies would be permitted to bid on lucrative Housing Authority window replacement contracts, and that bids had been "rigged" through efforts of a bid-rigging "club".

The case was based largely on consensual tape recordings made by Peter Savino, a self-described former "associate" of the "Genovese Crime Family". Also, Peter Chiodo, a self-described former "Luchese Crime Family" "Captain" testified at the trial.

Various window company executives testified about their own bid rigging activities vis-a-vis Housing Authority contracts, labor payoffs to Local 580 of the Architectural and Ornamental Ironworkers Union, and alleged extortionate acts directed toward them.

using this information as the basis for claims of due process violations.

Judge Dearie recused himself on the §2255 petition; District Court Judge Block, denied relief and denied the issuance of a Certificate of Appealability. (Memorandum and Order issued August 30, 1999, Case No. 98 CV 4970 (FB)).

Application for the issuance of a Certificate of Appealability was made on August 2, 2000. A Panel for the United States Court of Appeals for the Second Circuit (Hon. John M. Walker Jr., Chief Judge, Hon. Jose A. Cabranes, Hon. Chester J. Straub, Circuit Judges) placed the matter of the issuance of a Certificate of Appealability on its calendar for December 5, 2000. The panel deciding the issues presented by Mr. Mangano was waiting for the Second Circuit's decisions in *United States v. Guevara*, 00-1133 (2001 U.S. App. LEXIS 26835 (2nd Cir. decided December 18, 2001), and *United States v. Thomas*, 98-1051 (274 F.3d 655 (2nd Cir. decided December 12, 2001) before it would decide the matter of Mr. Mangano. Once these decisions are filed, the Court Clerk stated, the Panel will decide the motion for the issuance of a Certificate of Appealability in this case. The Second Circuit later declined to issue a Certificate of Appealability on June 26, 2003.

It remains the contention of Mr. Mangano that a Certificate of Appealability should have issued because, contrary to this District Court's restrictive ruling, there are substantial constitutional issues concerning the propriety of a judge accused of criminal activity (even if untrue) sentencing a defendant, especially based on uncharged conduct, where such discretionary departures are involved and the effect of the enhancement is to nearly double the term prescribed by the jury's verdict.

But there is even more reason the Court of Appeals should have granted a Certificate of Appealability since this Supreme Court has made clear that there must be limitations where huge sentencing increases are made by a judge, not a jury, (regardless of what they are called). *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Moreover, recently this Court stated in *Bunkley v. Florida*, that the principle of retroactivity does not apply when the State's highest court is the first interpretation of a criminal statue, and the effect is not to decriminalize certain conduct, but rather to lower the penalty. *Bunkley v. Florida*, No. 02-8636, 2003 U.S. Lexis 4273, 538 U.S. __, 123 S.Ct. __, (May 27, 2003) (citing *Fiore v. White*, 531 U.S. 225 (2001). This latter decision gives more support to the contention here that the *Apprendi* rule should be given a second look because of the *effect* of its holding on cases in courts after the *Apprendi* decison. In order to restore the balance of justice.

REASON FOR GRANTING PETITION

This petition for writ of certiorari comes to this United States Supreme Court by virtue of a claim of due process violation discussed in the recent Supreme Court decision in the case of *Bunkley v. Florida*, No. 02-8636, 2003 U.S. Lexis 4273, 538 U.S. __, 123 S.Ct. __, 155 L.Ed.2d 1046 (May 27, 2003). In *Bunkley*, this Court ruled that the principles of retroactivity do not apply when the State's highest court is the first interpretation of a criminal statute, and the effect is not to decriminalize certain conduct, but rather to lower the penalty. Id. In this instant matter, the "interpretation" by the United States Supreme Court in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), that any fact, other than a prior conviction, which goes to support a sentence in excess of the statutory maximum must be contained in the indictment and proved beyond a reasonable doubt resulted in a cascade of later cases following the Court's "interpretation" of the proof standard, these lower courts ruling that certain sentencing factors which go to support a sentence are substantive elements of the offense and must be included in the indictment, presented to a jury, and proved beyond a reasonable doubt.[3]

What this latest Supreme Court decision suggests is that an *Apprendi* violation brought under a claim that due process

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[3] See, e.g., *United States v. Powell*, 886 F.2d 81 (4th Cir. 1989) and *United States v. Edwards*, 105 F.3d 1179 (7th Cir. 1997) (both holding that drug quantity not aggravated element of crime but merely sentencing factor to be found by a sentencing court by the preponderance of the evidence), and contrast with the post-*Apprendi* decision of *Coleman v. United States*, 329 F.3d 77, at 82 (2nd Cir. 2003) (listing cases). What was once merely a sentencing factor under *McMillan v. Pennsylvania*, 477 U.S. 79 (1985) had become much more post-*Apprendi*.

was violated in an earlier proceeding under a later, and initial, interpretation of a statute or a guideline application, is in fact reviewable by the district court and that a retroactivity analysis is not necessary. This being the case, Venero Mangano, and being cognizant of most court's decisions holding that because the decision in *Apprendi* was judged to be merely a procedural new rule and not determined to be retroactive on collateral review, brings this issue via petition for writ of certiorari on the grounds that Venero Mangano was not given fair notice on the enhanced guideline application that would be used to raise his guideline level beyond that statutory maximum as defined by the United States Sentencing Guidelines and the charges in his indictment. The sentence in this particular case exceeds the statutory maximum allowed as per the counts for which he was found guilty, and he claims this violation on due process grounds in violation of his Fifth Amendment protections that "the Due Process Clause ... forbids a State to convict a person of a crime without first proving the elements of a crime beyond a reasonable doubt." *Fiore v. White*, 531 U.S. 225, at 228-229, 121 S.Ct. 712 (2001) (per curiam). This claim is based upon the premise that *Apprendi* represents the first interpretation, relative to the United States Sentencing Guidelines, of what constitutes an aggravated element of the crime which, without this *Apprendi* holding, further development of the law pertaining to these "sentencing factors" in the lower courts would not have been likely.

Petitioner Mangano requests that this Court grant certiorari review of this case to settle the issue of retroactive application of the *Apprendi* rule which has been the issue of such great debate in the lower courts.

CONCLUSION

For the reasons stated the petition for writ of certiorari should be granted.

Dated: Butner, North Carolina
October 6, 2003

Respectfully submitted,

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APPENDIX A

Memorandum and Order (Block, U.S.D.J.) of the United States District Court, Eastern District of New York Dated August 30, 1999

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, MEMORANDUM AND ORDER

Respondent,

–against–

JOSEPH AMATO, Case No. 98 CV 4905

Movant.

----------x

----------x

UNITED STATES OF AMERICA,

Respondent,

–against–

Case No. 98 CV 4970

VENERO MANGANO and
BENEDETTO ALOI,

Petitioners.

----------x

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BLOCK, District Judge:

I

This opinion consolidates two § 2255 motions[1] brought by defendants who were previously sentenced before the Honorable Raymond J. Dearie.[2] Both motions are based, in part, upon a statement to an FBI agent in 1991 by Alphonse D'Arco ("D'Arco"), a government witness in a related trial,

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[1] Although the caption designates Mangano and Aloi as "petitioners," 28 U.S.C. § 2255 provides for a motion, and, therefore, they shall be referred to as "movants".

[2] These motions have been randomly reassigned to the undersigned after Judge Dearie recused himself. Amato has requested that his motion be heard by a judge outside the Eastern District of New York. There is no reason why the Court cannot adjudicate the motion.

United States v. Amuso, 90 CR 446 (E.D.N.Y. 1992), that Judge Dearie was susceptible to the influence of organized crime. This statement was contained in an FBI 302 prepared by the agent in the course of the *Amuso* investigation. It states, in pertinent part,:

> D'ARCO advised that an attempt was recently made to influence United States District Court Judge (USDCJ) DEARIE with regard to the "Windows case." D'ARCO explained that SAL AVELLINO suggested to D'ARCO that NEIL MIGLIORE be contacted and told to utilize his contact with USDCJ DEARIE. D'ARCO was led to understand that MIGLIORE had somehow been involved in influencing the selection of DEARIE to become U.S. Attorney several years ago.
>
> * * * *
>
> D'ARCO proceeded to convey to MIGLIORE the sentiment that USDCJ DEARIE needed to be reached. MIGLIORE acknowledged that DEARIE owed a favor due to his previous appointment, and that he could, in fact, be reached. D'ARCO told him that the judge should do everything for VIC AMUSO, and that PETER CHIODO should be discredited. . . . Finally, D'ARCO told MIGLIORE that if he was unsuccessful in reaching USDCJ DEARIE, MIGLIORE should let D'ARCO know right away.
>
> D'ARCO noted that he was never recontacted by MIGLIORE, and that he assumed that the message was conveyed.

FBI Form FD-302 of ALPHONSE D'ARCO dated October 2, 1991 ("D'Arco 302"), at 1-2.

Both motions are also based upon claims of ineffective assistance of counsel and challenge the propriety of the government's grant of leniency to cooperating witnesses in return for their testimony. In addition, the joint motion brought by Venero Mangano ("Mangano") and Benedetto Aloi ("Aloi") separately asserts that there was no evidentiary basis to support an upward sentencing departure. For the reasons set forth below, the motions are denied in their entirety.

II

A. Amato Trial

During the course of a power struggle between members of the Colombo Organized Crime Family, Matteo Speranza ("Speranza"), a seventeen-year-old boy who was working in a bagel store, was shot and killed. After the murder, Joseph Amato ("Amato") aided in hiding the shooter and disposing of the automobile used in the murder. At his trial, Amato was convicted by a jury of being an accessory after the fact to the Speranza murder. Robert Gallagher ("Gallagher"), one of Amato's co-defendants, was convicted of committing violent crimes to gain entrance and increase his position in the Colombo Crime Family, and also of using and carrying guns in crimes of violence.

On March 29, 1996, at Gallagher's sentencing, when asked if he had anything to say, he gave an extended speech in which he questioned Judge Dearie's impartiality. Specifically, Gallagher stated that he was in possession of the D'Arco 302, and after quoting from the document, he claimed that Judge Dearie was taking an unfairly hard-line in organized crime cases in order to clear his name. March 29, 1996 Transcript ("Tr.") at 10-23. Prior to that date, there is no evidence that Judge Dearie had any awareness of the

D'Arco 302. In order to give the situation adequate consideration, Judge Dearie adjourned the sentencing. March 29 Tr. 27-28.

At the adjourned sentencing date, Amato's counsel, James LaRossa ("LaRossa"), informed the court that he had been aware of the D'Arco 302 from an unrelated 1992 matter. He had not, however, previously informed Amato as to its contents. After learning what had happened when Gallagher first appeared for sentencing, LaRossa discussed the matter with Amato and advised him to consider bringing an ineffective assistance of counsel claim for LaRossa's failure to move for Judge Dearie's recusal prior to trial. Amato requested time to consult with independent counsel, and the court once again adjourned the sentencing. April 2, 1996 Tr. at 3-6.

Thereafter, Amato accepted LaRossa's advice and brought a *pro se* motion for a new trial, asking Judge Dearie to recuse himself from deciding the motion. On April 11, 1996, the court denied the motion from the bench, stating *inter alia,:*

> Having considered the matter thoroughly, that were an application made to me by you or any attorney prior to the outset of this trial for me to recuse myself on the basis of material presented by Mr. Gallagher, I would have denied it, as I will deny the motion to recuse me now.
>
> Where that gets us in terms of competency of counsel ... there is no basis to a charge that counsel was in any way incompetent.

April 11, 1996 Tr. at 4. On the same date, Amato, still represented by LaRossa for sentencing purposes, was

sentenced by Judge Dearie principally to 151 months of imprisonment.

Amato subsequently retained new counsel — the same attorney with whom he had consulted regarding his claim of ineffective assistance during the sentencing adjournment — and unsuccessfully appealed to the Second Circuit. *See United States v. Malpeso,* 115 F.3d 155 (2d Cir. 1997). He did not raise in his appeal the issue of LaRossa's representation.

B. Mangano and Aloi Trial

Mangano and Aloi were convicted of Hobbs Act extortion and conspiracy due to their involvement in an organized crime effort to control the window replacement market in the New York metropolitan area (the "Windows Case"). *See United States v. Gigante,* 39 F.3d 42, 44-45 (2d Cir. 1994), *vacated and superseded in part,* 94 F.3d 53 (2d Cir. 1996), *cert. denied Aloi v. United States,* 118 S. Ct. 179 (1997).

In February of 1993, prior to sentencing, the government moved for an upward departure based upon, among other things, Mangano and Aloi's involvement in a conspiracy to murder potential prosecution trial witnesses. In support of its departure motion, the government, *inter alia,* offered the testimony of D'Arco from the *Amuso* trial.

At some time between the verdict and sentencing, the government attorney contacted Mangano and Aloi's respective counsel and stated "that there had been some 'general' allegation made to the effect that Judge Dearie was ... 'beholden to the Mob' and was 'on the take.'" Mangano and Aloi's Memorandum in Support of the § 2255 Petition ("Mangano and Aloi Mem.") at 13-14. The parties dispute,

however, whether defense counsel were told that D'Arco was the witness who made this allegation. In any event, Mangano and Aloi "presume" that the allegation was also conveyed to Judge Dearie, although they do not submit any evidence to support this presumption. Mangano and Aloi Mem. at 15. The allegation was never conveyed to them because their attorneys did not believe that Judge Dearie was susceptible to organized crime influence.

At sentencing, Judge Dearie held that "the credible evidence before the Court ... has established by at least a preponderance of the evidence that defendants Mangano and Aloi were members of a conspiracy to murder witnesses associated with the Window investigation." Sentencing Transcript, March 26, 1993, ("S. Tr."), at 13. Accordingly, he determined that: 1) a two level enhancement was warranted for obstruction of justice; and 2) an upward departure of three levels for Mangano and five levels for Aloi was also warranted. *See* U.S.S.G. § 5K2.0 (allowing the sentencing judge to depart from the guideline range if there are "aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines"). In March, 1993, they were sentenced by Judge Dearie principally to 188 and 200 months of imprisonment, respectively.

Represented by the same counsel as at trial, Mangano and Aloi appealed. They contended, among other arguments, that in respect to the upward departures, the court should have applied a clear and convincing standard of proof instead of a preponderance of the evidence standard, and, in any event, the evidence was not sufficient even under a preponderance standard. On October 24, 1994, the Second Circuit affirmed their convictions. *See Gigante,* 39 F.3d 42, *as modified,* 94 F.3d 53. It did not pass upon the standard of proof issue,

simply concluding that the evidence was "compelling" regardless of the applicable burden of proof standard and, therefore, the departures were appropriate. *Gigante,* 94 F.3d at 56.

Mangano and Aloi did not raise on appeal the issue of the allegation against Judge Dearie in the D'Arco 302. They claim in that respect that they first learned of it after it was disclosed by Gallagher at his sentencing. *See* Mangano and Aloi Mem. at 14.

III

Under § 2255 a federal prisoner may make a motion to "vacate, set aside or correct [a] sentence" upon "the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such a sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack." 28 U.S.C. § 2255.

"A § 2255 motion may not relitigate issues that were raised and considered on appeal." *United States v. Perez,* 129 F.3d 255, 260 (2d Cir. 1997) (citation omitted); *see Hooper v. United States,* 112 F.3d 83, 86-87 (2d Cir. 1997) (citations omitted); *Riascos-Prado v. United States,* 66 F.3d 30, 33 (2d Cir. 1995) (quotations and citations omitted). Also, "[a]bsent a fundamental miscarriage of justice, a federal prisoner who fails to raise an issue on direct appeal cannot subsequently raise the issue in a § 2255 petition unless he can show cause for his failure to raise the issue on appeal" and prejudices resulting therefrom. *Underwood v. United States,* 166 F.3d 84, 87 (2d Cir. 1999) (citing *Campino v. United States,* 968 F.2d 187, 190 (2d Cir. 1992)).

Regarding a § 2255 claim of ineffective assistance of trial counsel, it will not be barred if it is based upon matters not contained in the trial record or it the appellate counsel was also the trial attorney. *See Billy-Eko,* 8 F.3d 111, 114 (2d Cir. 1993). In this latter regard, "[i]t is the rare attorney who can be expected to contend on appeal that his representation was so poor that he deprived his client of a fair trial." *Ciak v. United States,* 59 F.3d 296, 303 (2d Cir. 1995).

1. Non-Hearsay Evidence at Sentencing – Due Process

Mangano and Aloi claim that due process requires that the upward sentencing departure determination be supported by at least some non-hearsay proof. Mangano and Aloi Mem. at 28. This argument was previously raised unsuccessfully at the trial level, *see* Mangano Memorandum in Response to the Government's Motion for an Upward Departure at 3 ("[t]he government bases its request for this extraordinary upward departure entirely on double and triple hearsay statements"); *id.* at 8, 12, 17 (again raising this argument); Aloi Letter Brief dated March 4, 1993 at 1, 3, 5 (arguing that two of the three witnesses' testimony was entirely hearsay), and unsuccessfully raised by implication to the Circuit Court of Appeals as part of the argument that the government failed to sustain the preponderance of the evidence burden of proof necessary for the upward sentencing departure. *See* Aloi Appellate Memorandum at 19 (raising the hearsay argument); Mangano Appellate Memorandum at 40-41 (joining the argument). Movants nonetheless assert that "[w]hile the Court of Appeals concluded that the proof was sufficient, its willingness to accept hearsay upon hearsay upon hearsay, we suggest, does violence to the Due Process notion that sentencing must be based upon reliable data." Mangano and Aloi Mem. at 28. Because this issue was raised and considered on appeal, Mangano and Aloi cannot again raise the issue in their § 2255 motion. *See Perez,* 129 F.3d at

260. Furthermore, even if movants did not raise this claim on direct appeal, they have not made the requisite showing of cause and prejudice, or a fundamental miscarriage of justice, to warrant § 2255 review. *See Underwood,* 166 F.3d at 87.[3]

2. Promises to Cooperating Witnesses

All movants claim that by granting cooperating witnesses leniency in exchange for their testimony at trial, the government violated 18 U.S.C. § 201(c)(2), which bars giving things of value to persons for their testimony. The underlying facts regarding this claim were clearly extant at the trial, and consequently, could have been raised on direct appeal. Therefore, since movants have made neither a showing of cause and prejudice nor a fundamental miscarriage of justice, this claim also is barred from § 2255 review. *See Underwood,* 166 F.3d at 87. In any event, the claim is based upon the Tenth Circuit's ruling in *United States v. Singleton,* 144 F.3d 1343 (10th Cir. 1998) (government's promise of leniency in exchange for testimony violated 18 U.S.C. § 201(c)(2)), which subsequently was countermanded and vacated by the Tenth Circuit sitting *en banc. See United States v. Singleton,* 165 F.3d 1297 (10th Cir. 1999). Furthermore, the Second Circuit has recently stated that it agrees with the reasoning of the Tenth Circuit's *en banc* opinion and has concluded "that 18 U.S.C. § 201(c)(2) does not apply to the United States . . . ." *See United States v. Stephenson,* --- F.3d ---, No. 98-1490, 1999 WL 437082, at *7 (2d Cir. June 30, 1999).

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[3] Mangano and Aloi's ineffective assistance of counsel claims based upon this issue is, accordingly, academic. *See Strickland v. Washington,* 466 U.S. 668 (1984) (setting for standard of review for claims of ineffective assistance of counsel).

3. Amato's Claim of Ineffective Assistance Based on Cross-Examination

Amato claims that his trial counsel was ineffective for failing to lay the proper foundation for the introduction of inconsistent statements by Anthony Libertore, a government witness. Although Amato was represented by new counsel on his direct appeal, this claim is based entirely upon the record, and therefore is procedurally barred since he has shown neither cause and prejudice nor a fundamental miscarriage of justice.

4. D'Arco 302

The Court will consider all of the claims related to the D'Arco 302 on the merits because they arguably represent matters not contained in the trial record.

a. Due Process – Fair Trial

All the movants claim that they were denied a fair trial 'because of the subconscious but surely present impulse on the part of an affected judge to 'bend over backward' to show that he was not 'reached' by 'organized crime.'' Mangano and Aloi Mem. at 24; *see also* Amato Mem. at 3-4 (the accusations may have influenced Judge Dearie to show his "toughness on organized crime" and thus lose his impartiality). None of the movants assert, however, that Judge Dearie even knew of the D'Arco 302 prior to Gallagher's sentencing. Even assuming, however, that Judge Dearie knew of the D'Arco 302, this claim is meritless.

"[T]he Due Process Clause clearly requires a fair trial in a fair tribunal, before a judge with no actual bias against the defendant or interest in the outcome of the particular case." *Bracy v. Gramley,* 520 U.S. 899, 904-05 (1997).

Furthermore, a judge is required to recuse himself "in any proceeding in which his impartiality might be questioned." 28 U.S.C. § 455(a) (1993). In determining whether recusal is required, "the test to be applied is an objective one which assumes that a reasonable person knows and understands all the relevant facts." *In re International Bus. Mach. Corp.,* 45 F.3d 641, 643 (2d Cir. 1995). Because a recusal motion "is a serious matter, 'striking at the integrity of the judicial process,'" *McCann v. Comm. Design Corp.,* 775 F. Supp. 1506, 1522 (D. Conn. 1991) (Cabranes, J.) (quoting *In re International Bus. Mach. Corp.,* 618 F.2d 923, 927 (2d Cir. 1980)), in order to justify recusal, the evidence presented must create an "objectively reasonable basis for questioning a judge's impartiality." *In re International Bus. Mach.,* 45 F.3d at 644. "A judge should not recuse himself on unsupported, irrational or highly tenuous speculation." *United States v. LaMorte,* 940 F. Supp. 572, 576-77 (S.D.N.Y. 1996). As stated by the First Circuit Court of Appeals:

> No permissible reading of 455(a) would suggest that Congress intended to allow a litigant to compel disqualification simply on unfounded innuendo concerning the possible partiality of the presiding judge. Indeed, a trial judge must hear cases unless some reasonable factual basis to doubt the impartiality of the tribunal is shown by some kind of probative evidence.

El Fenix de Puerto Rico v. The M/Y Johanny, 36 F.3d 136, 140 (1st Cir. 1994) (internal quotations and citations omitted); *see Herskowitz v. Charney,* No. 93 Civ. 5248, 1994 WL 455172, at *4 (S.D.N.Y. Aug. 18, 1994) ("mere conclusions, opinions, rumors and vague gossip" are insufficient to justify recusal) (quoting *Hodgson v. Liquor Salesman's Union Local No. 2,* 444 F.2d 1344, 1348 (2d Cir. 1971)).

The D'Arco 302 provides nothing but innuendo and bald boasts by Migliore, a convicted criminal, that he could influence Judge Dearie. It does not indicate that any contact was made between Migliore and Judge Dearie; nor is there any scintilla of evidence even remotely indicating that Judge Dearie was in any way not impartial. While the Court notes that the D'Arco 302 gives an impression of Migliore's beliefs, it gives no impression whatsoever of Judge Dearie's beliefs. *Cf. King v. United States,* 576 F.2d 432, 437 (2d Cir. 1978) (letter which defendant sent to the judge "casting aspersions upon the motivations and intent of the judge ..." did not justify recusal because, while it "may very well establish [the defendant's] feelings toward [the judge], [it had] no tendency to show [the judge's] feelings toward [the defendant]").

In sum, even if Judge Dearie was aware of the D'Arco 302, there is simply no basis to question his impartiality. Therefore, the Court concludes that Judge Dearie had no duty to recuse himself, and movants' claim that they were denied a fair trial is meritless.[4]

b. *Brady* Violation

Mangano and Aloi claim that although the government informed their counsel that the subject allegation had been made against Judge Dearie, they were not informed that the allegation had been attributed to D'Arco. Consequently, they claim that the government violated its *Brady* obligation because such a "foolish" allegation could have been used to attack D'Arco's credibility. Mangano and Aloi Mem. at 19; *see Brady v. Maryland,* 373 U.S. 83, 87 (1963) (government suppression of material evidence favorable to the accused

[4] The ineffective assistance of counsel claims based upon this issue is, accordingly, academic.

violates due process); *Giglio v. United States,* 405 U.S. 150 (1972) (government failure to disclose evidence affecting credibility of witnesses may violate due process).

"To the extent that the prosecutor knows of material evidence favorable to the defendant in a criminal prosecution, the government has a due process obligation to disclose that evidence to the defendant." *United States v. Avellino,* 136 F.3d 249, 255 (2d Cir. 1998); *see Strickler v. Greene,* 119 S. Ct. 1936, 1948 (1999); *Kyles v. Whitley,* 514 U.S. 419, 431 (1995); *Brady,* 373 U.S. at 87. The government's obligation extends to evidence useful for the impeachment of government witnesses. *See Strickler,* 119 S. Ct. at 1948; *Giglio v. United States,* 405 U.S. 150, 154-55 (1972); *Avellino,* 136 F.3d at 255.

"If the government has failed to disclose to the defendant evidence favorable to him, relief is warranted only if the evidence was material." *See Avellino,* 136 F.3d at 256. "[F]avorable evidence is material, and constitutional error results from its suppression by the government, if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Kyles,* 514 U.S. at 433-44. "Assessment of that question involves an objective inquiry that asks not what a particular defendant would do but rather what is 'the likely persuasiveness of the withheld information.'" *Avellino,* 136 F.3d at 256 (quoting *Tate v. Wood,* 963 F.2d 20, 24 (2d Cir. 1992)). "[W]here the undisclosed evidence merely furnishes an additional basis on which to challenge a witness whose credibility has already been shown to be questionable or who is subject to extensive attack by reason of other evidence, the undisclosed evidence may be cumulative, and hence not material." *Id.* at 257.

In *Avellino,* the Second Circuit held that the government's failure to disclose impeachment evidence regarding prior perjury by D'Arco did not constitute a *Brady* violation. *See Avellino,* 136 F.3d at 258. It noted that D'Arco's past was replete with impeachment material, stating:

> D'Arco had already admitted his involvement in, in his own words, "[m]urder, high-jacking, burglary, arson, gambling, [a]rson, ... murder, counterfeiting, loansharking, extortion, labor racketeering, ... illegal union racketeering, threats, assaults, that type of activity. At the prior trials he acknowledged that he twice had been convicted of crimes and had served prison terms, once for a scheme involving stolen stock certificates and once for possession of, and conspiracy to distribute, heroin. In addition, at his plea hearing, D'Arco acknowledged that the activities of the Luchese family also included various frauds and the "distribution of drugs," and he stated, *inter alia,* "I carried on the daily activities of the Luchese crime family; I passed on orders and I acted on orders, and ... every day I took care of the affairs of the enterprise." There was thus a wealth of disclosed evidence with which D'Arco could have been impeached.

Id. (internal citations omitted).

In the present case, contrary to Mangano and Aloi's assertion, D'Arco was not making any allegation about Judge Dearie; he was merely repeating an allegation which had been made to him, and not vouching for its truth. Furthermore, even assuming, *arguendo,* that D'Arco's comments could be considered a foolish allegation which could have been used to impeach him, this would nonetheless

be merely cumulative impeachment evidence lost among the myriad reprehensible activities which D'Arco had already admitted committing. *Cf. United States v. Orena*, 32 F.3d 704, 717 (2d Cir. 1994) (disclosure of additional evidence of drug trafficking would not affect credibility of witness in light of already "ample evidence ... of [witness'] horrendous history or criminal activity"). Clearly, the allegedly withheld information could not have had any persuasive effect on the fact-finder's assessment of D'Arco's credibility. Therefore, the Court concludes that this evidence was not material and, accordingly, rejects the *Brady* claim.

IV

For the above stated reasons, movants' § 2255 motion is denied. A certificate of appealability will not be issued, as movants have not made a substantial showing of the denial of a federal right. *See* 28 U.S.C. § 2253.

SO ORDERED.

/s/
FREDERIC BLOCK
United States District Judge

Dated: Brookyn, New York
August 30, 1999

APPENDIX B

Decision of the United States Court of Appeals for the Second Circuit Dated June 26, 2003

E.D.N.Y.
98-cv-4970
Block, J.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 26th day of June two thousand and three,

Present:

Hon. John M. Walker, Jr.,
Chief Judge,
Hon. José A. Cabranes,
Hon. Chester J. Straub,
Circuit Judges.

Venero Mangano; Benedetto Aloi,
Petitioners-Appellants,

- v - 99-2522

United States of America,
Respondent-Appellee.

Appellants move for a certificate of appealability. Upon due consideration, it is ORDERED that the motion is denied and the appeal is dismissed. The appellants have not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c). To the extent the appellants raise a claim pursuant to Apprendi v. New Jersey, 530 U.S. 466

(2000), the claim fails because Apprendi does not apply retroactively to first 28 U.S.C. § 2255 motions. See Coleman v. United States, 329 F.3d 77, 79 (2d Cir. 2003).

FOR THE COURT:
Roseann B. MacKechnie, Clerk

By: /s/ Lucille Carr